U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE ISSUED: FEB 2 1990
CASE NO. 88-INA-102

IN THE MATTER OF THE APPLICATION
FOR AN ALIEN EMPLOYMENT CERTIFI-
CATION UNDER THE IMMIGRATION AND
NATIONALITY ACT

Marion Graham,
Employer,

on behalf of

Gladys Yolanda Ulloa,
Alien

BEFORE: Litt, Vittone, Guill, Brenner, Marden, Murrett, Romano, Tureck, and Williams;
Administrative Law Judges

For the Board
James Guill
Associate Chief Judge

DECISION AND ORDER

This appeal arises from an application for labor certification pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14) (Act). The Certifying Officer (CO) of the United States Department of Labor denied the application, and Employer requested administrative-judicial review pursuant to 20 C.F.R. §656.26.[1]

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

[1] All regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

Employers desiring to employ aliens on a permanent basis must apply for labor certification pursuant to 20 C.F.R. Part 656. These regulations require an employer to document that the job opportunity has been and is being described without unduly restrictive requirements. If the job requirements which an employer is requiring of U.S. workers are: (1) other than those normally required for the job in the United States; (2) exceed the requirements listed in the Dictionary of Occupational Titles (D.O.T.); (3) include a foreign language; (4) involve a combination of duties or (5) require the worker to live on employer's premises, they are presumptively unduly restrictive, and the employer must demonstrate by documentation that its requirements arise from a business necessity. §656.21(b)(2)(i), (ii), and (iii).

This review is based on the record upon which the denial was made, together with the request for review as contained in the Appeal File (AF 1-26)[2] and the written arguments of Employer. §656.27(c).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Background

On December 26, 1986, an application for labor certification pursuant to §212(a)(14) of the Act was submitted by Marion Graham (Employer) on behalf of Gladys Yolanda Ulloa (Alien) for the position of "HOUSEWORKER GENERAL/CHILD MONITOR (Live-In)." (AF 11, at item 9). The duties of the position were listed on ETA Form 750-A as follows:

> Responsible for cleaning 2 story house of 3,000 square feet.
>
> Cleans 3 bedrooms, 4 bathrooms, 2 living rooms, 1 dining room, 1 bar area, 1 kitchen area, also cleans garage area. Irons clothes. Polishes furniture and silverware and glassware. Waters plants. Changes linens. Answers phone and bell door. Feed 2 dogs. Cleans 8 glass windows, 9 glass doors and 3 big mirros [sic].
>
> Full supervision and responsibility on absence of parent of 1 infant girl of 1 (one) years of age. Cooks meals and prepare formulas for her. Bathe, dress her. Supervise and participate in her play activities.

(AF 11, at item 13). Employer submitted that 50-percent of the duties required for the position were household related and 50-percent related to child monitoring. (AF 11, at item 13). As a condition of employment, Employer required that the person hired live in her home, have 3-months experience and be willing to work Monday through Friday, Saturdays and Sundays when requested, and 3 to 4 hours overtime daily. Employer also required that the employee not smoke or drink [alcoholic beverages] at the work site and that he or she have a legal right to work in the United States. (AF 11, at items 9, 14 & 15). No U.S. workers responded to Employer's advertisement. (AF 16).

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[2] References to the record are citations to the Administrative file.

On April 30, 1987, the CO issued a Notice of Findings (NOF) which proposed to deny certification on the basis of §656.21(b)(2), which requires that the job opportunity be described without unduly restrictive requirements. In the NOF the CO challenged the requirement that the employee hired live in the employer's home as being unduly restrictive. (AF 8). The CO stated, however, that Employer could delete the live-in requirement and readvertise the position, or she could provide documentation that the live-in requirement arises from a business necessity. (AF 9).

In its letter of rebuttal, dated May 23, 1987, Employer attempted to demonstrate that the live-in requirement arises from a business necessity. (AF 5). Employer asserted that the work shift is divided so that 50-percent of the working hours pertain to the household cleaning and 50-percent child monitoring; the household is very busy; because Employer's husband is a Hospital President, on call 24 hours a day a live-in employee is needed to screen calls at night; Employer personally accompanies her husband at times on his business trips, and therefore a live-in is required to take full responsibility for the child and household; the cost of paying a housekeeper and a night care child monitor is very expensive; Employer has to run different types of personal errands every day, including helping to care for her sick mother. Employer also asserted that because the Alien has cared for the child since birth, she has confidence in her. (AF 5-6).

On July 15, 1987, the CO issued a Final Determination (FD) denying certification finding that Employer had failed to document the live-in requirement as arising from a business necessity. (AF 4). On July 22, 1987, Employer timely submitted a request for administrative-judicial review. (AF 1).

II. Applicability of §656.21(b)(2)(iii)

Under the basic labor certification process as set forth in §656.21, an employer must document that the job opportunity has been described without unduly restrictive job requirements. §656.21(b)(2). In instances where the worker is required to live on the employer's premises, the requirement will be deemed unduly restrictive unless the employer adequately documents that the requirement arises from a business necessity. §656.21(b)(2)(iii).

Although the word "business" is generally used in the context of a commercial enterprise, the use of the term "business necessity" in §656.21(b)(2)(iii) was not intended by the drafters of the regulation (the Employment and Training Administration (ETA)) to limit application of the subsection to commercial enterprises. During the Notice and Comment procedure, the following response to comments concerning proposed §656.21(b)(2)(iii) was made by ETA:

> Seven attorneys objected to the provision that a requirement that the worker live on the employer's premises be documented as a business necessity. They contended that a household is not a business, that this requirement is an unwarranted intrusion into personal lives of individuals, and that living on the employer's premises is customary for household domestic service workers.

> The specific language in the regulations did not refer only to private households, but to all job opportunities which require a worker to live on the employer's premises, although the majority of such job opportunities have been in private households. It is not the intention of DOL to intrude into the personal affairs of individuals or to single out private households. The provision is intended to emphasize the need to document the business necessity for a requirement that is not normally required for the job in the United States or is not defined for the job in the Dictionary of Occupational Titles. It merely clarifies DOL's consistent interpretation of its previous rules, and therefore is retained in the final rule.

Comments on Proposed Rules, 45 Fed. Reg. 83926, 83929 (Dec. 19, 1980). This regulatory history establishes that the drafters of §656.21(b)(2)(iii) did not intend to exclude noncommercial employers, and that noncommercial enterprises must also show a business necessity for a live-on-the-premises requirement.

III. "Business" to which §656.21(b)(2)(iii) applies

Although the regulatory history of §656.21(b)(2)(iii) establishes that the requirement of showing a business necessity is applicable to employers seeking to obtain labor certification for a domestic live-in worker, it does not resolve the question whether the relevant "business" in "business necessity" involves only an employer's outside business activities, or whether it involves the "business" of operating a household or managing one's personal affairs.

The regulations contained in Part 656 offer no guidance in defining "business necessity" for live-in cases. Nor is guidance found in the Immigration and Nationality Act of 1952 (Act), or its amendments. In fact the Act does not include any reference to the term "business necessity." Rather, it simply provides that in order for labor certification to be granted, an employer, on behalf of an alien, must establish to the Secretary's satisfaction that there are no willing, qualified, and available U.S. workers to perform the job, and that employment of the alien will not adversely affect the wages and working conditions of U.S. workers. 8 U.S.C. §1182.

Although no federal district or circuit court has squarely addressed the issue, those which have touched on the question of "business necessity" in the context of live-in domestic workers[3] have indicated that Employer's out-of-home business activities, the circumstances of the

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[3] "Business necessity" is used as a legal term of art in only one context outside of alien labor certification--that is, in cases involving disparate impact under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e. The legal contexts of alien labor certification and civil rights disparate impact cases, however, are quite distinct, and no guidance is apparent from these cases for purposes of defining the scope of the "business" involved in the term "business necessity" under 20 C.F.R.§656.21(b)(2)(iii). See, for example, In re Information Industries, Inc., 88-INA-82 (Feb. 9, 1989) (determining that the interpretation of "business necessity" in Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971) cert. denied 404 U.S. 950 (1971), was not appropriate for defining that term in alien labor certification cases).

household, and other extenuating circumstances or hardships may be taken into account in the consideration process.

In Pesikoff v. Secretary of Labor, 501 F.2d 757 (D.C. Cir. 1974), reh'g denied, (1974), cert. denied, 419 U.S. 1038, 95 S. Ct. 525 (1974), although the court denied labor certification on the ground that there were readily available American workers in the general labor market and did not reach the merits of "business necessity," it indicated that business necessity for a live-in is reached if the requirement is necessary to get the job done. Specifically, the court approved Employer's disregard of specifications which were not necessary to getting the basic job accomplished, and stated that allowing a live-in to do work which could be accomplished by a live-out would create an incentive to work an alien at least intermittently around the clock, thus not protecting American workers. By indicating that the live-in requirement must be necessary to get the job done, the court implied that it is something intrinsic in the job (in this instance the operation of the household) and not the outside business activities of Employer which manifests the live-in requirement.

Although not directly discussing the question of "business necessity", the dissent in Pesikoff did discuss the kind of criteria it believed to be relevant in determining whether certification should be granted to an alien live-in domestic. The dissent quoted guidelines issued by the Department of Labor (DOL) to its field staff, noting that DOL has recognized that a case involving parents who both work and have pre-school age children presents special considerations for exploration. Pesikoff, supra at 769. Specifically, the guidelines provide that certification of a live-in domestic worker is to be approved

> [i]f there is absolutely no availability of live-in, live-out, or day workers because of insurmountable transportation difficulties or other specific identifiable reasons, and no adverse effect.

Field Memorandum No. 183-69, U.S. Dept. of Labor, Manpower Administration, October 10, 1969 (emphasis in original). Example II of the guidelines, as quoted by the dissent, states:

> In addition to housekeeping, the duties specified include care of pre-school children . . . or similar hardship. [In this situation, if] there is absolutely no availability or adverse effect, the basis for considering the stated condition for child care . . . must be fully explored and when reasonable should be documented. Certification can be issued if it is ascertained that the job duties and hours are reasonable and that the possible irregularity of attendance of dayworkers would create hardship.

Field Memo, supra (emphasis as indicated in Pesikoff at 769, footnote 16). The Pesikoff dissent also suggested that the majority erred in not considering the fact that Employer was a child psychiatrist, his wife a law student, and that there were two preschool children in the home in determining the reasonableness of the requirement that the worker live-in.

In Silva v Secretary of Labor, 518 F.2d 301 (1st Cir. 1975), the court held that the refusal of the Secretary to issue labor certification in favor of an alien for work as a live-in maid based on the availability of U.S. day workers, was arbitrary because the job specifications required more than daytime employment and required the employee to live on the employer's premises, and this kind of domestic help was not available from local labor sources. Although the case did not squarely resolve the question of whether the relevant business activity is the Employer's outside employment or the manag ment of the household, the court's extended discussion of Employer's professional activities, the household circumstances, as well as medical conditions of the persons in the household, strongly supports the conclusion that it is proper to take those factors into account when deciding whether Employer has established a "business necessity".

Similarly, in Jadeszko v. Brennan, 418 F. Supp. 92 (E.D. Pa. 1976), the court held that the Secretary abused his discretion in denying labor certification by deciding that a live-in maid was equivalent to day time help. The court reasoned that it is an abuse of discretion for the Secretary to treat an employer's requirements as irrelevant and that he must not determine that a day worker would be sufficient without giving the employer an opportunity to establish its need--the Employer must be given an opportunity to establish why live-in help is so much more desirable than day time help in its particular situation. Thus, the court implied that there may be many factors necessitating a live-in domestic.

In Ross v. Marshall, 651 F.2d 846 (2nd Cir. 1981), the Court reversed the Secretary's denial of labor certification on grounds other than the "business necessity" issue but recognized that the Secretary's position that "business necessity" could only be established by the employer's outside business activities had far reaching implications. Although the question was not resolved because of withdrawal of the case on remand, the appellate court had remanded the case to the District Court for consideration of "whether anything more than a showing of bona fide desire for a live-in domestic housekeeper is required under the statute or the applicable regulation, properly construed." In that regard, the court questioned whether the Secretary's argument that the "business necessity" test requires the Employer to show that his or her business activities outside the home make the live-in requirement necessary "comports with either the Department's statutory authority or with common sense."

As the term "business" as it is used in §656.21(b)(2)(iii) is not defined by the Act, the regulations, or the caselaw, it is necessary that we determine its meaning.[4] Where a term is not defined in a statute, a court is compelled to start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used. Russello v. United States, 464 U.S. 16, 78 L.Ed.2d 17, 104 S. Ct. 296 (1983); Diamond v. Diehr, 460 U.S. 175, 67 L.Ed.2d 155 155, 101 S. Ct. 1048 (1981) (stating that "Unless otherwise defined words will be interpreted as taking their ordinary, contemporary, common meaning. . . . "). The rule that the ordinary and commonly

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[4] Administrative agencies have the authority to interpret their own rules, Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 77 L.Ed.2d 796, 53 S. Ct. 350 (1933), and should provide a clear and definitive interpretation of rules, particularly those rules the operation of which can generate deeply serious consequences, F.T.C. v. Atlantic Richfield Co., 567 F.2d 96, 185 U.S. App. D.C. 229 (D.C. Cir. 1977).

understood meaning shall be attributed to terms employed in statutes, unless a contrary meaning is clearly intended, is applicable to the interpretation of administrative regulations. Whelan v. United States, 529 F.2d 1000, 208 Ct. Cl. 688 (Ct. Cl. 1976).

In Webster's II New Riverside University Dictionary (1984) "business" is described as having a core meaning of "commercial, industrial, or professional dealing," although it is also defined as "Serious work or endeavor" and as "An affair or matter." The Random House College Dictionary (1982) defines "business" as "an occupation, profession, or trade," but also defines it as "a person's rightful concern; legitimate field of inquiry," an "affair; situation," and "a task or duty; chore." Webster's New Collegiate Dictionary (1976) defines "business" as a "purposeful activity," "an immediate task or objective," and as "a particular field of endeavor." This dictionary also includes other definitions of "business" indicating that business usually has a commercial connotation.

Thus, while dictionary definitions of "business" indicate that "business" usually has a commercial meaning attached to it, those definitions also indicate that "business" can, in some contexts, have a meaning that includes other purposeful activities.

It is also a tenet of statutory construction that words in statutes "should take color from their surroundings . . . And derive meaning from the context of the statute, which must be read in light of the mischief to be corrected and the end to be obtained." NLRB v. Hearst Publications, 322 U.S. 111, 64 S. Ct. 851 (1944). While the first principle of regulatory construction may be that regulatory terms not given specific regulatory definition are to be interpreted according to their commonly understood definitions, a court is not to concentrate on individual terms and ignore consideration of the context in which the term appears. Shepherd Oil, Inc. v. Atlantic Richfield Co., 734 F.2d 23 (Temp. Emer. Ct. App. 1984). When engaged in statutory or regulatory interpretation, the court should look to the common sense of a statute or regulation, to its purpose, and to the practical consequences of the suggested interpretations. New York State Commission on Cable Television v. F.C.C., 571 F.2d 95 (2d Cir. 1978), cert. denied 439 U.S. 821, 59 L.Ed.2d 112, 99 S. Ct. 85 (1985). A fortiori, immigration laws and their implementing regulations must be read so as to be a useful and effective part of the whole statute. See Lloyd Royal Belge Societe Anonyme v. Elting, 61 F.2d 745, 746 (2d Cir. 1932), cert. denied, 289 U.S. 730 (1932); Hamburg-American Lines v. Etling, 73 F.2d 272 (2d Cir. 1934), cert. denied, 295 U.S. 770 (1935).

In setting the context for construction of the term "business necessity" under §656.21(b)(2)(iii), we must be mindful that the subsection was promulgated to aid in implementation of the Secretary's responsibility under the Act to determine and certify that (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. Workers similarly employed. We must be equally mindful that the Act provides for no more and no less; it expresses no intent to distinguish between employers on the basis of whether that employer is a commercial enterprise or a noncommercial enterprise such as a private household.

Considering the absence of guidance from the Act or the regulations as to the meaning of the term "business necessity" under §656.21(b)(2)(iii), the fact that the federal district and circuit courts which have touched on the subject imply that many factors are relevant when determining business necessity in a live-in domestic situation, the fact that dictionary definitions of "business" do not exclude use of the term in non-commercial contexts, and the context of labor certification which does not direct the Secretary to make any sort of judgment on the value of the employment opportunity offered but only on availability of and impact on U.S. Workers, we conclude that the relevant "business" is the "business" of running a household or managing one's personal affairs. To construe "business necessity" so as require consideration to be limited to the employer's outside business interests in the context of labor certification of a domestic worker would infuse the Secretary with the discretion to decide what business needs and personal social and economic preferences are best for the country--a discretion that goes well beyond the responsibility imposed on the Secretary under the Act.

IV. Application of business necessity test in live-in domestic context

To establish the business necessity for a live-on-the-premises requirement for a domestic worker, the employer must demonstrate that the requirement is essential to perform, in a reasonable manner, the job duties as described by the employer. In the context of a domestic live-in worker, pertinent factors in determining whether the live-on-the-premises requirement is essential for the performance of the job duties include the Employer's occupation or commercial activites outside the home, the circumstances of the household itself, and any other extenuating circumstances. Those factors must be weighed on a case-by-case basis. The presence or absence of any one concern in a particular case may not be determinative.[5]

Although a judgment on the merits of the job opportunity as it relates to a private employer's lifestyle choice is not a relevant consideration,[6] a mere personal preference to have an employee live on the premises does not establish business necessity.

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[5] The fact that a particular Employer does not have an occupation outside the home, for example, would not preclude that Employer from obtaining labor certification for a domestic live-in worker if some other factor showing business necessity is documented for the live-in requirement, such as the Employer being an invalid. On the other hand, the mere fact that an Employer is an invalid may not itself establish the business necessity for a live on the premises requirement. Hence, if several United States workers could perform the work required, the fact that the Employer is an invalid who needs constant care may not justify the live-in requirement. It is noted, however, that employment of an around-the-clock service may prove to be exorbitantly expensive and therefore inappropriate. See Silva v. Secretary of Labor, 518 F.2d 301, 309 (1st Cir. 1975).

[6] For example, a Certifying Officer may not conclude that business necessity has not been shown simply because that Officer believes that live-in domestic service is a luxury reserved for the rich.

V. Application of the test to Marion Graham, Employer

To meet the business necessity test of §656.21(b)(2)(iii), Ms. Graham's evidence must establish that the live-on-the-premises requirement is essential for the Alien to perform, in a reasonable manner, the job duties of general household worker/child monitor.

Written assertions which are reasonably specific and indicate their sources or bases are to be considered documentation which must be given the weight it rationally deserves. In re Gencorp, 87-INA-659 (Jan. 13, 1988). When applying the business necessity test in a live-in domestic situation, a requisite degree of specificity for a written assertion generally should, at the very least, enable the Certifying Officer to determine whether there are cost-effective alternatives to a live-in requirement and whether the needs of the household for a live-in worker are genuine. For example, if one of the reasons proffered for the live-in requirement is absence of Employer from the home, the assertions should specify the length (e.g. overnight, days at a time, 18-hours per day, etc.) and frequency (e.g., three or four days a week, weekends, etc.) of the absences. The Board also notes that, as a general matter, documentation to bolster assertions of a need for a live-in requirement will go a long way in establishing the credibility of those assertions (e.g., travel vouchers; written estimates of the costs of alternatives such as a phone answering service or babysitters).

The relevant evidence in this case consists entirely of written assertions made by Employer in her December 13, 1986 letter to the California Employment Development Office (AF 14) and her May 23, 1987 letter of rebuttal.[7] (AF 5-6). The assertions show four factors purportedly making the live-on-the-premises requirement essential for the Alien to perform, in a reasonable manner, the job duties of general household worker/child monitor: (1) the need for a person to screen telephone calls since Employer's husband is a hospital president who is on call 24-hours per day; (2) the need for someone to attend the house and to monitor Employer's child while employer is away on business trips with her husband, running errands, or attending her sick mother; (3) the need for someone to be present when the Grahams return home in the evening; and (4) the lessened expense of hiring a live-in domestic as opposed to hiring both a housekeeper and a night child care monitor.

We conclude that Employer's statements herein do not constitute documentation: they are neither reasonably specific nor do they adequately indicate their sources or bases. The record fails to show the frequency of late-night telephone calls, or why a professional answering service could not perform the screening function Employer asserts is necessary. Neither does the record show the number of days per month Ms. Graham has been away from home overnight, or the likelihood of her future absences from home on business with her husband, performing errands, or caring for her sick mother. Further, the record does not show how much extra cost, if any,

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[7] The assertion of a trust that has developed between Ms. Graham and the Alien, Ms. Ulloa, while an understandable concern, is not relevant to the business necessity for the live-in requirement: "I trust the Alien, therefore, I need a live-in" is devoid of logic.

would be involved in hiring a child monitor and housekeeper for the particular nights that the Grahams anticipate being away from home. In short, the record established by Employer in this case consists solely of unsupported allegations which are insufficient to document business necessity for the live-on-the-premises requirement. Hence, the Certifying Officer's denial of labor certification must be affirmed.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

At Washington, D.C. Entered:

James Guill
Associate Chief Judge

JLG/trs

In the Matter of Marion Graham, 88-INA-102
Judge Joel R. Williams joined by Judges Tureck and Litt dissenting

We agree with the business necessity test for live-in domestic workers set forth by the majority in this case. However, we do not agree that the denial of labor certification should be affirmed. The Certifying Officer never requested in his Notice of Findings any of the specific documentation that the majority finds lacking. See: Young Chow Restaurant 87-INA-697 (January 13, 1989) (en banc) (Where the Certifying Officer wants certain information in rebuttal, it is his burden to request the specific information.) All he noted was that "[t]here is no evidence employer's jobs are so erratic as to preclude hiring a day worker." Consequently, we would Remand this case to the Certifying Officer in order to give the Employer the opportunity to submit the documentation which the majority deems necessary to establish business necessity in light of the test for live-in domestic workers first enunciated here.